



United States
General Accounting Office
Washington, D.C. 20548

General Government Division



B-275097

December 13, 1996

The Honorable John J. Duncan, Jr.
The Honorable Marcy Kaptur
The Honorable Ron Klink
The Honorable Mark W. Neumann
House of Representatives

This letter provides the information and analysis you requested regarding the applicability of the Buy American Act to procurements made by the Library of Congress. In your September 16, 1996, letter, you expressed concern that two Library contractors used subcontractors employing foreign nationals, which may have violated the Buy American Act. Your request letter specifically mentioned a newspaper article alleging that two Library contractors for the American Memory Project subsequently subcontracted work to firms using Jamaican and Filipino workers. You asked that we determine the extent to which these subcontracts employed foreign labor, what public funds have been used to pay for foreign labor, and whether such contracting violated federal law.

Shortly after we received your request, Library officials briefed members of your offices and us on these issues. After that briefing, the Library provided us with copies of the two contracts together with related cost information. Our review primarily involved an evaluation of this information. Subsequently, we met independently with representatives of your offices to discuss the Library's briefing and the additional data the Library provided to us and its relationship to the Buy American Act. At that meeting, we were asked to report on the following: (1) an overview of the Buy American Act; (2) the Library's compliance with the Buy American Act for the two contracts reported in the press; and (3) the adequacy of the Library's contracting procedures relating to the Buy American Act, including our views on whether certain contract offers should be looked at more closely in regard to the act.

As explained below in more detail, the Buy American Act, with several exceptions, generally requires federal agencies to give a preference to domestically produced end products over foreign end products in their procurements. The act does not apply to contracts for services. Our review of the information available indicated that the two Library contracts in question did not violate the act. The Library's

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procedures relating to the Buy American Act appear to be generally adequate for determining whether an offeror has complied with the act once the Library has determined whether the procurement is for an end product or a service. While the question of whether a procurement is for an end product or a service can be difficult, it is the responsibility of the contracting agency to make this determination.

PROVISIONS OF THE BUY AMERICAN ACT

The Buy American Act, 41 U.S.C. 10a-10d (1994), requires that federal agencies give a preference to domestically produced goods over foreign goods in their procurements. The legislation was enacted during the Great Depression, with the objective of saving and creating jobs for American workers. As implemented by the Federal Acquisition Regulation (FAR) Part 25, the act has several exceptions, but it generally requires agencies to provide a preference for domestic articles, materials, and supplies in their procurements. The act does not apply to contracts for services.

The act states that federal agencies should give a procurement preference for "only such manufactured articles, materials and supplies as have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured, as the case may be, in the United States." Under the FAR, manufactured articles are considered domestic if they have been manufactured in the United States from components substantially all of which have been mined, produced, or manufactured in the United States. "Substantially all" is defined in FAR 25.101 to mean that the cost of domestic components exceeds 50 percent of the cost of all components in the end product. Thus, for example, an end product manufactured in the United States that has foreign components that make up 49 percent of its cost would be considered a domestic end product. Agencies generally determine whether an offer is for foreign or domestic end products on the basis of a certification by the offeror.

The act and the FAR establish a preference for domestic end products; they do not prohibit the purchase of foreign end products. Under FAR 25.102, if the cost of procuring a domestic product is considered unreasonable, on the basis of a comparison of the domestic and foreign price proposals, an agency may purchase the foreign product. FAR 25.105 provides that if the domestic offer is from a large business the price of a domestic end product may be considered unreasonable if it exceeds the price of the lowest acceptable foreign offer by more than 6 percent. If the domestic offer is from a small business, the domestic price is considered unreasonable if it exceeds the foreign offer by more than 12 percent. In addition, articles purchased for use outside the United States are exempted from the act. Further, under FAR 25.102, no preference for domestic products is required under the act if the purchasing agency determines that such preference would be inconsistent with the public interest or if the products are not manufactured domestically in sufficient and reasonably available commercial quantities or are not of satisfactory quality.

There are some exceptions to the general applicability of the act. For example, many United States trading partners have become eligible for an exemption because of international trade agreements. Also, 22 countries designated as Caribbean Basin countries can avoid the application of the act for certain products.

The Library of Congress is included within the definition of federal agencies covered by the Buy American Act.¹ The Library has adopted a policy of following the FAR, including the FAR provisions implementing the Buy American Act. Library officials said that for manufactured end products, they incorporate the terms of the act by reference as a clause in their requests for proposals, which become part of the contracts issued. Library officials said that when a question arises as to whether a procurement is for a manufactured end product or a service, the Library includes the Buy American Act clause and certification requirement in the request for proposals.

THE LIBRARY'S HANDLING OF TWO CONTRACTS REPORTED IN THE PRESS

Recent news articles reported that the Library of Congress entered into contracts to convert Library printed materials into electronic formats, portions of which were then subcontracted to firms that performed work in Jamaica and the Philippines. According to Library officials, the two contracts were awarded as part of the American Memory Project, a pilot program that ran from 1990 to 1995 to make various documents in the Library's collections available to schools and public libraries through computers. Library officials said the two contracts involved rekeying selected text portions to make the material searchable by word or subject matter. Library officials said the two contracts under which rekeying was carried out using foreign labor complied with the Buy American Act. As explained below, the information we reviewed regarding these contracts supported the Library's position.

The American Memory Project, which was the first stage of the National Digital Library, involved making historical source material available in various electronic formats. Library officials said that six contracts were awarded under the project to digitize Library materials. Digitizing is the process of converting text and other visual materials, as well as audio and video clips, to computer-readable form. According to the Library, the six digitization contracts were primarily for the following services: (1) scanning materials to create digital images from text, photographs, and images; (2) creating digital audio and video clips; and (3) rekeying selected text portions to make the text searchable by word or subject matter.

Library officials said all six contracts were awarded to U. S. firms on the basis of full and open competition and the only work done outside the United States was subcontracted rekeying for two of the contracts. Library officials said that because they were not sure whether the digitization process should be considered a manufactured end product or a service, they included the Buy American clause in the requests for proposals for both of the contracts.

¹See 41 U.S.C. 10c and 40 U.S.C. 472 (1994).

The first Library contract, number N70145 (RFP 90-16), was awarded in 1990 to Automated Sciences Group of Silver Spring, MD, on the basis of a combination of technical quality and low cost. The contract was for the production of a CD-ROM disk containing two textual Library collections: (1) 270 18th century printed broadsides,² and (2) 800 19th century printed pamphlets. This was a firm fixed-price contract in the amount of \$191,821. The prime contractor's planned use of subcontracted rekeying labor in Jamaica was identified in the proposal. The contractor certified that the end product of the contract would be domestic. The proposal indicated that the work in Jamaica would involve rekeying those documents that were not legible through the contractor's scanning process. According to Library officials, as is customary for a firm fixed-price contract, there is no information in the contract file that indicates the amount the prime contractor paid subcontractors. According to the Library's technical director for the contract, the keying effort done in Jamaica involved approximately 11,000 pages of material. At an estimated cost of \$1 per 1,000 characters, the Library estimated that about \$24,200—or 12.6 percent of the total contract amount—went toward the work done in Jamaica.

The second contract, number I70284 (RFP 92-45), was awarded in 1992 to Systems Integration Group of Lanham, MD, which had submitted the only acceptable offer. The award to Systems Integration Group was an indefinite quantity, firm fixed unit price contract for a projected amount of \$1,321,340. This contract was for the conversion of the content of Library manuscripts, books, pamphlets, and posters into images and coded full texts. The contractor certified that the end product of the contract would be domestic. The contractor's bid indicated that some of the keying effort would be done at an offshore facility but did not specify where or to what extent. The cost of the actual work done during the contract totaled \$660,354. According to Library officials, about \$239,000 of the contract was for subcontractor-performed text conversion. Library officials estimated that about 55 percent of the text conversion work involved rekeying in the Philippines, and the remaining 45 percent was for other work performed by the subcontractor in its U.S. facility. According to the Library estimates, \$131,000 of the total \$660,354, or 19.8 percent, was paid for the text conversion work done in the Philippines.

ADEQUACY OF THE LIBRARY'S PROCEDURES FOR THE BUY AMERICAN ACT

When a procurement by a federal agency is covered by the Buy American Act, the agency determines whether an offer is for domestic or foreign end products generally on the basis of a certification from the offeror that each end product called for in the contract is a domestic end product. The certification requires that end products, not

²A broadside is a single piece of paper, printed on one side, that is to be separately published, posted or publicly distributed, and read unfolded. Examples of broadsides are handbills, newsheets, and proclamations.

components, that are of foreign or unknown origin must be enumerated in the offer. In the absence of any information to the contrary, the contracting officer may accept an offeror's Buy American Act certification.³ If the agency has reason to believe prior to the award that a foreign end product will be furnished, the agency must conduct a further investigation.⁴

In both of the contracts involved here, the winning firms indicated that some of the work would be done by offshore subcontractors. However, as provided for in the FAR, these firms certified that they were providing domestic end products. Since there was no information that caused the Library to question the certifications, the Library properly accepted the certifications in awarding these contracts. The additional information on the completed contracts that the Library furnished us in connection with our inquiry was consistent with the certifications that no foreign end products were provided.

While the question of whether a procurement is for a manufactured end product covered by the act or a service that is not covered sometimes is a difficult issue, it is the responsibility of the contracting agency to make this determination. Once it has made that determination, the Library may rely on the certification provided by the offeror as it did here, unless it has reason to believe that a foreign end product will be furnished, in which case the Library should investigate the matter further prior to award. Library officials have indicated they would do so under such circumstances.

On November 21, 1996, we provided copies of a draft of this letter to the Librarian for comment. On November 29, the Library's Chief of Staff wrote us and said that the Library's principal staff officers had reviewed the draft and believed it accurately stated the facts.

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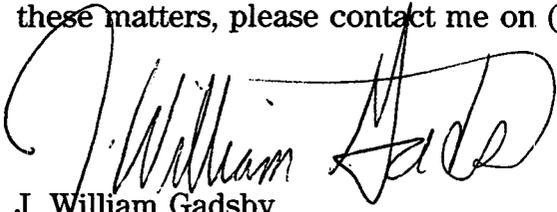
We are sending copies of this letter to the Chairmen and Ranking Minority Members of the Joint Committee on the Library, the House Oversight Committee, the House Government Reform and Oversight Committee, the House and Senate Legislative Branch Appropriations Subcommittees, the Senate Rules and Oversight Committee, and the Senate Governmental Affairs Committee; and the Librarian of Congress. We

³Designware Inc. B-221423, Feb. 20, 1986, 86-1 CPD 181.

⁴General Kinetics, Inc. Cryptek Division, 70 Comp. Gen. 473 (1991), 91-1 CPD 445.

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will also make copies available to others on request. If you have any questions on these matters, please contact me on (202) 512-8387.

A handwritten signature in black ink, appearing to read "J. William Gadsby". The signature is written in a cursive style with a large, looping initial "J".

J. William Gadsby
Director, Government Business
Operations Issues

(240226)

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